Supreme Court, U.S.
FILED
MAR 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1069

(2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

ALFREDO LUNA REGALADO, PETITIONER

v.

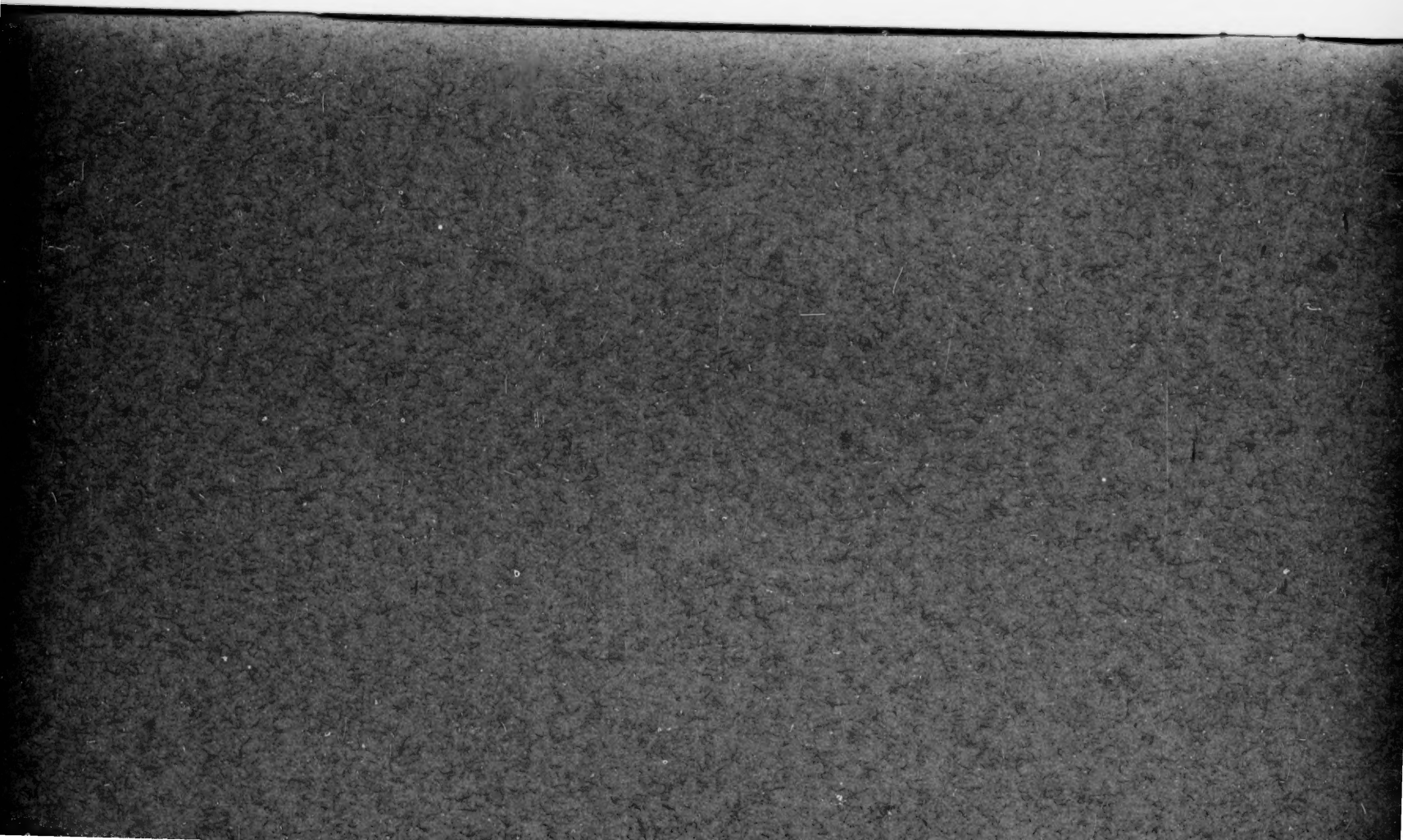
UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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app



QUESTION PRESENTED

Whether a bank check in bearer form that is more than two months old is a "monetary instrument" for purposes of 31 U.S.C. 5316(a)(1)(B) (1982 & Supp. IV 1986) and its implementing regulations.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	6

TABLE OF AUTHORITIES

Statutes and regulations:

31 U.S.C. 5311	5
31 U.S.C. 5312(a)(3)	2
31 U.S.C. 5316(a)(1)(B) (1982 & Supp. IV 1986)	2
31 C.F.R.:	
Section 103.11(k)	2, 4, 5
Section 103.11(k)(ii)	5
Section 103.11(k)(iii)	5

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 857 F.2d 789 (Table).

JURISDICTION

The judgment of the court of appeals was entered on August 30, 1988. A petition for rehearing was denied on October 11, 1988 (Pet. App. 9a). On December 6, 1988, Justice White extended the time for filing a petition for a writ of certiorari to December 27, 1988, and on December 24, 1988, the petition was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was con-

victed on one count of knowingly transporting into the United States monetary instruments of more than $10,000 without filing a Currency and Monetary Report, in violation of 31 U.S.C. 5316(a)(1)(B) (1982 & Supp. IV 1986). He was sentenced to three years' imprisonment and was fined $2,000. The execution of the prison term was suspended, and petitioner was placed on probation for three years. The court of appeals affirmed (Pet. App. 1a-8a).

1. Section 5316(a)(1)(B) (1982 & Supp. IV 1986) of Title 31 provides in pertinent part that persons must file a report whenever they "transport[] * * * monetary instruments of more than $10,000 at one time * * * to a place in the United States from or through a place outside the United States * * *." The term "monetary instruments" includes "United States coins and currency" and "as the Secretary [of the Treasury] may prescribe by regulation, coins and currency of a foreign country, travelers' checks, bearer negotiable instruments, bearer investment securities, bearer securities, stock on which title is passed on delivery, and similar material" (31 U.S.C. 5312(a)(3)). Acting pursuant to the latter grant of authority, the Secretary has promulgated a regulation, 31 C.F.R. 103.11(k), which defines "monetary instruments" to include:

> (i) Currency;
>
> (ii) All negotiable instruments (including personal checks, business checks, official bank checks, cashier's checks, third-party checks, promissory notes (as that term is defined in the Uniform Commercial Code), traveler's checks, and money orders) that are either in bearer form, endorsed without restriction, made out to a fictitious payee (for the purposes of § 103.23), or otherwise in such form that title thereto passes upon delivery;

(iii) Incomplete instruments (including personal checks, business checks, official bank checks, cashier's checks, third-party checks, promissory notes (as that term is defined in the Uniform Commercial Code), traveler's checks, and money orders) signed but with the payee's name omitted; and

(iv) Securities or stock in bearer form or otherwise in such form that title thereto passes upon delivery.

2. The evidence at trial is summarized in the court of appeals' opinion (Pet. App. 2a-3a) and in the government's brief in the court of appeals (Gov't C.A. Br. 3-6). It showed that on July 1, 1987, petitioner, a former Customs officer, returned to the United States from Mexico. As he approached the border check point, petitioner passed a sign notifying persons of the obligation to report currency or monetary instruments, including negotiable instruments in bearer form, that exceed $10,000. At the primary inspection station, petitioner denied that he was bringing into the United States "money over $10,000." At the secondary inspection point, he denied that he was bringing $10,000 or more in cash or checks from Mexico. A search of petitioner's car, however, revealed $8,715 in United States currency, and a check in bearer form in the amount of $2,530. Pet. App. 2a-3a; Gov't C.A. Br. 3-5.

At trial, Rebecca Benavides, who had signed the check, testified for the defense. She stated that she had given the check to petitioner, who was a bail bondsman, to obtain her brother's release on bond. Ms. Benavides explained that she had not intended that the check be cashed, but rather that the check be held until her brother could pay petitioner. She further testified that she did not have sufficient funds to cover the check; that petitioner had told her that he had misplaced the check; and that she had stopped payment on the check on July 10, 1987. Govt. C.A. Br. 5-6.

Petitioner testified that he knew that the check was the type of "negotiable instrument" covered by the statute and regulations. He stated, however, that he had not known that the check was in the car. Moreover, petitioner asserted that because the check was two months old, and because it was not intended to be cashed, he did not think that the check was negotiable. Govt. C.A. Br. 6.

3. The court of appeals affirmed in an unpublished decision (Pet. App. 1a-8a). The court explained that the check at issue "is expressly covered by the applicable Treasury regulations" (*id.* at 4a), and that under Texas law the check is a "negotiable instrument in bearer form" (*id.* at 5a). The court rejected petitioner's claim that the check was valueless, noting that the jury had "found the check to have the requisite value" (*id.* at 6a).*

ARGUMENT

1. Petitioner contends (Pet. 4-5) that the check he brought into the United States was valueless because there were insufficient funds with which to pay it. Accordingly, he asserts, "[a]pplication of Section 5316 to the facts of the instant case does not serve the legislative purpose"—which, in his view, is "tracking unusual currency movements related to illegal activity" (Pet. 5). But the question whether the check was actually valueless was one of fact; and as the court of appeals explained, the jury "found the check to have the requisite value" (Pet. App. 6a). In any event, 31 C.F.R. 103.11(k) contains no exception for monetary instruments that the maker does not intend to be cashed.

2. Petitioner also contends (Pet. 5-7) that the check was more than 60 days old, "a fact that significantly im-

* The court of appeals also rejected two challenges to the jury instructions (Pet. App. 6a-8a). The petition does not present those issues.

paired its status as a negotiable instrument" under 31 C.F.R. 103.11(k). Petitioner asserts that 31 C.F.R. 103.11(k) "should be construed as restricted to a check where negotiability is not impaired under state law by being overdue or by being irregular on its face" (Pet. 7). "Any other construction," petitioner surmises, "would render 31 C.F.R. Section 103.11(k) inconsistent with Congress' intent and, therefore invalid" (*ibid.*).

There is no basis for petitioner's narrowing construction of 31 C.F.R. 103.11(k). That provision applies by its terms to "[a]ll negotiable instruments * * * in bearer form" (31 C.F.R. 103.11(k)(ii)), and not simply to those in which the negotiability is free from potential defenses. Indeed, 31 C.F.R. 103.11(k)(iii) extends to certain "[i]ncomplete instruments"—which presumably are subject to challenge by the maker. Moreover, giving the regulations their plain meaning does not contravene Congress's intention "to require certain reports * * * where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings" (31 U.S.C. 5311). A check in bearer form may be of considerable use for all of those purposes, even if the check is more than 60 days old.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1989

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00173